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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 563

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma, *Petitioner*

v.

OCCIDENTAL PETROLEUM CORPORATION, *Respondent*

PETITION FOR REHEARING

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ARGUMENT

By a vote among seven justices the petition for certiorari filed in this case was denied on February 18, 1963. Chief Justice Warren stayed issuance of the order of denial on February 21, pending the timely filing of a petition for rehearing.

This petition for rehearing is rooted in the premise that highly significant issues of law and policy were either decided or blinked in the decision of the Court of Appeals for the 10th Circuit, and that the extremely

broad ramifications thereof somehow have not yet been framed with ideal clarity for this Court's appraisal.

Our petition for certiorari focussed mainly upon the serious legal questions of whether the Circuit Court, being a court of statutory and limited jurisdiction, had power to conduct a trial *de novo;* and whether, in reviewing a trial judge's rejection of an affidavit of personal bias found under 28 U.S.C. § 144, the sole question before the court is the "legal sufficiency" of the affidavit, as is unquestionably true of the trial courts themselves, *Berger* v. *U. S.*, 255 U.S. 22, and as seems to be the practice of most courts of appeal, *e.g.*, *Green* v. *Murphy*, 250 F. 2d 591, 593 (1st Cir. 1958); *cf.* also *Albert* v. *U. S. Dist. Court for Western Dist. of Mich.*, 283 F. 2d 61 (6th Cir. 1960); *United States* v. *Onan*, 190 F. 2d 1 (8th Cir. 1951); *Tucker* v. *Kerner*, 186 F. 2d 79 (7th Cir. 1950); *Eisler* v. *U. S.*, 170 F. 2d 273 (D.C. Cir. 1948).

Respondent's brief in opposition did not take a position on either of the above or any other questions of law raised in the petition. Instead, Respondent emphasized the factual transactions which it felt justified Judge Chandler's recusation. It catalogued the actual statements and actions of the Judge which, in Respondent's view, implied personal bias or hostility toward the party seeking his disqualification. Secondly, it argued that the "judicial misconduct" in this case was so heinous and reprehensible as to warrant the 10th Circuits's expulsion of Judge Chandler from the case on the strength of the appellate court's inherent supervisory powers over trial courts.

The petition and the brief in opposition do not controvert each other. They simply talk about different

things. Petitioner was not, and is not now, particularly concerned with whether the allegations in the affidavit did in fact logically imply personal bias on the Judge's part, or whether these plus all the additional transcript excerpts cited in Respondent's brief suggest such bias. Petitioner's concern is with such legal questions as whether a court of appeals may review by trial *de novo* a trial judge's refusal to disqualify himself pursuant to a 28 U.S.C. § 144 affidavit of bias; whether in such a review the sole question before the court is the legal sufficiency of the affidavit; and, if so, what are the legal standards by which this "sufficiency" is determined. The decision of the 10th Circuit ordering Judge Chandler's disqualification could well be vacated as a nullity because it lacked jurisdiction to conduct a trial or because it failed to address itself to the central question of the affidavit's legal sufficiency, and yet this would have nothing whatever to do with the factual question of bias. Upon reconsideration, the 10th Circuit might still conclude in favor of Judge Chandler's removal, on the ground that the affidavit was indeed legally sufficient. The difference, however, between that possible result and the outstanding order is that the former would, by hypothesis, be decided according to proper legal standards while the decision already rendered was most assuredly not arrived at by valid legal means. Though the end result might be identical, the difference between the two cases is far from academic. The difference is so significant, in fact, as to merit this Court's attention by way of review on certiorari, for at least two distinct reasons elaborated below.

First, let us understand why the outstanding opinion was legally defective. Viewing the case as a review by

original mandamus proceeding of the trial judge's rejection of an affidavit and refusal to recuse himself, there is virtually undeniable error in the 10th Circuit's refusal to decide the "legal sufficiency" of the affidavit. It did not even consider the affidavit, but instead elected to conduct a new trial of its own. In *Berger* v. *U. S.*, *supra,* this Court gave 28 U.S.C. § 144 the only definitive construction it has received. It held that when confronted with an affidavit of bias the presiding trial judge must decide whether its factual allegations, assumed to be true, are "sufficient" to compel his disqualification, *i.e.*, whether they imply personal bias against the affiant. He must not inquire into the accuracy of the factual allegations at all, but simply determine whether they ". . . show the objectionable inclination or disposition of the judge . . . ." If so, he has a duty to recuse himself. If this is the ambit of the trial judge's inquiry, it follows *a fortiori* that the same limitation to "legal sufficiency" applies to an appellate court's review—at least where, as here, the review was *solely* concerned with the rightness or wrongness of the trial judge's rejection of the affidavit and refusal to disqualify himself.

This analysis demonstrates error in the 10th Circuit's decision. Error alone, of course, does not necessarily afford sufficient grounds for a writ of certiorari. Why then should this Court review and correct the errors in this particular case? Petitioner suggested that there are two reasons. The first is predicated upon the error just demonstrated. If the 10th Circuit erred in conducting its own trial and making findings of fact that Judge Chandler had improperly conducted closed meetings, evinced personal bias against a litigant and that "[t]he proper administra-

tion of justice requires" his expulsion from the whole case, such putative "facts" should be erased from the record for the sake of posterity. The deleterious effects of such "findings," both as to the professional standing of the Judge and to the business of his District, are quite self-evident. The end result for the affiant here may be the same. The Judge may still be disqualified. But petitioner submits that in the interest of fairness this result should be achieved by legal rather than extra-legal means. The 10th Circuit should be required to review the legal sufficiency of the affidavit alone. If it properly concludes that it was sufficient, the Judge's refusal to recuse himself may properly be reversed. The result then would be the same as now, but with this signal distinction: it would then have been achieved on the strength of legally sufficient *allegations* whereas now it will, unless this Court intervenes, rest upon findings of *fact*—which the 10th Circuit evidently lacked authority to make.

A second reason for reviewing this case is that it clearly frames a highly significant issue of judicial policy, namely, the extent to which federal courts of appeal may or should exert "supervisory" powers over the administration of justice in federal trial courts. Indeed, in a broad sense, this is the transcendent issue of this entire matter. The basic policy question has troubled the courts before. In reviewing a petition based upon the "general supervisory powers of the Courts of Appeal over the judges of the District Courts . . .," Judge Magruder, speaking for the First Circuit, has recently observed:

> "Contrary to the view which seems to have been occasionally taken, or at least *sub silento* assumed, in other courts of appeals, we do not think that 28

> U.S.C. § 1651 [the All Writs Act] grants us general roving commission to supervise the administration of justice in the federal district courts within our circuit . . . ." *In re MacNeil Bros. Co.*, 259 F. 2d 386, 287.

With this one can readily contrast the pronouncement of Chief Judge Murrah, made and assented to by other judges in the instant case:

> We are not just sitting here to decide the legal sufficiency of an affidavit to disqualify a trial judge. We are sitting here in the exercise of our supervisory powers as a court . . . ." (Respondent's Brief, p. 11)

Related to this overall problem of judicial policy is the subsidiary question of whether the courts of appeal, as the 10th Circuit suggests in its opinion, possess "inherent powers . . . 'to effectuate what seems (sic) . . . to be the manifest ends of justice,' " where that "inherent power" focuses upon the conduct of a trial court. Petitioner simply cannot accept the literal import of the 10th Circuit's words. Certainly they are at odds with earlier utterances of the Supreme Court, *e.g.*, *Whitney* v. *Dick*, 202 U.S. 132, 137 ("It will be borne in mind that the circuit court of appeals, which is a court created by statute . . . is not in terms endowed with any original jurisdiction. It is only a court of appeal."); *Ex parte Bollman*, 4 Cranch 75, 93 (" . . . [C]ourts which originate in the common law possess a jurisdiction which must be regulated by their common law . . . but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."); *Kentucky* v. *Powers*, 201 U.S. 1, 24 ("We say . . . the subordinate judicial tribunals of the United States can exercise

only such jurisdiction, civil and criminal, as may be authorized by acts of Congress.")

However this may be, the 10th Circuit has surely purported to act in a supervisory capacity, whether the jurisdiction to do so be bottomed upon the All-Writs Acts or its assertedly "inherent" power. A serious and recurrent problem of judicial policy is thereby clearly raised and ripe for adjudication by this Court. The problem is raised more starkly and graphically than perhaps in any other vehicle for decision tendered to this Court in a long time. If the courts of appeal possess such supervisory powers, this is surely the time for the Supreme Court to announce this proposition and, perhaps more important, to set out clear standards for the application of such powers. If they do not, Petitioner submits, this is all the more reason to vacate the 10th Circuit's order, expunge its putative findings of fact, and compel it to decide anew in a narrower compass and according to the legal standards hitherto understood to prevail as to review of a trial judge's refusal to recuse himself.

Respectfully submitted,

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